Internal Revenue Service

memorandum

CC:TL
Br4:JTChalhoub

date: September 4, 1986

to: District Counsel, Laguna-Niguel CC:W:LN

from: Director, Tax Litigation Division CC:TL

subject: Technical Advice -- Statute of Limitations -- Waivers Under I.R.C. § 6213(d).

This is in response to your request for technical advice, dated July 2, 1986, relating to the application of the statute of limitations in respect of I.R.C. § 6213(d) waivers or consents to assessment. We are withholding any conclusion at this time on your question whether Form 4549, because of its wording, should be treated as an I.R.C. § 6213(d) waiver, if received prior to issuance of a notice of deficiency. We will address this issue in a subsequent memorandum at a later date.

ISSUES

1. Does a suspension of the statute of limitations on assessment under I.R.C. § 6503(a)(1) become operative if the office considering the case (i.e. district director, service center or appeals function) receives an I.R.C. § 6213(d) Form 870 waiver of the restrictions on, and consent to, the assessment of a deficiency before that office issues a notice of deficiency? 6213.08-00; 6501.13-00; 6503.00-00.

2. Does the Service have at least 60 days from receipt of such a waiver to make the assessment even if the statute of limitations on assessment will expire one day after receipt of such waiver. 6213.08-00; 6501.08-05.

3. Does an I.R.C. § 6213(d) waiver conditioned on acceptance by the Service, e.g., Form 870-AD have any effect on the suspension period under I.R.C. § 6503(a)(1), if signed by the taxpayer and received before issuance of a statutory notice of deficiency? 6213.08-00; 6501.08-06.

CONCLUSIONS

1. Although our conclusion is not without some doubt, we believe that pursuant to present case law in the Tax Court, an I.R.C. § 6503(a)(1) suspension period would apply to the amount of a proposed deficiency in the absence of a prior assessment of such amount based on an I.R.C. § 6213(d) waiver of such amount

that was received but not assessed before issuance of a notice of deficiency for that same amount. In our view the Service would have 90 plus 60 (or 150 plus 60) days plus "tack time" from the date of the notice of deficiency within which to make the assessment. This conclusion does not conflict with Rev. Rul. 66-17, 1966-1 C.B. 272, which is based on different facts. Neither does this conclusion mean that the waiver is not effective with respect to the amount waived. Nonetheless, we recommend that every effort be made to assess within 60 days of the date of receipt of the waiver.

2. Effective with respect to I.R.C. § 6213(d) waivers received on or after July 19, 1984, the Service has at least 60 days from the date of receipt of any such document to make an assessment for a taxable year, if the waiver is received within 60 days prior to the expiration date of the statute of limitations on assessment with respect to such taxable year. I.R.C. § 6501(c)(7).

3. Form 870-AD does not have any contrary effect on the conclusion set forth in answer to question 1. In the case of Form 870-AD, the waiver is not effective until it has been signed by a representative of the Commissioner who has delegated authority to accept the waiver on behalf of the Service.

LAW

I.R.C. § 6213(a) provides, in relevant part, that the Commissioner is prohibited from making an assessment and is prohibited from levying or suing to collect a deficiency, notice of which has been mailed to the taxpayer, for a period of 90 or 150 days, as the case may be. If a petition is filed with the Tax Court during the 90 or 150 day prohibition period, the prohibition period is extended until the decision of the Tax Court has become final.

I.R.C. § 6213(d) provides that a taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed document in writing filed with the Service, to waive the restrictions on assessment and collection of the whole or any part of a deficiency.

I.R.C. § 6501(a) provides the general rule that the Service has three years from the time a return is filed within which to assess the amount of any tax imposed with respect to such return. Under one exception to the three-year rule, any written document signed by the taxpayer which admits an increase in tax liability for the taxable year and which is received by the Service within the 60 days prior to expiration of the statute of limitations for such taxable year, permits the Service to have at least 60 days from the date of receipt of such document to make the assessment of such increase in tax. I.R.C. § 6501(c)(7).

I.R.C. § 6503(a)(1) provides, in relevant part, that the running of the period of limitations on assessment under I.R.C. § 6501 shall be suspended in respect of any deficiency in tax, notice of which has been sent to the taxpayer, for the period during which the Service is prohibited from making an assessment and for 60 days thereafter.

Revenue Ruling 66-17, 1966-1 C.B. 272, holds that the 90-day prohibition period of I.R.C. 6213(a), following issuance of a notice of deficiency, terminates upon receipt within such prohibition period of a statutory notice waiver Form 870 under I.R.C. § 6213(d), and such receipt begins the 60-day suspension period prescribed in I.R.C. § 6503(a)(1).

DISCUSSION OF ISSUE NO. 1

As we understand the situation, the majority of cases producing this issue are cases in which the Service has sent the taxpayer a thirty-day letter or a statement of proposed adjustments and an agreement or form to waive the restrictions on assessment. The instructions to the taxpayer are to return the agreement by a certain date or the Service will consider the case unagreed and process it further for issuance of a notice of deficiency pursuant to I.R.C. § 6213(a). For whatever reason, e.g., inability to pay, disagreement with the adjustments, absence from home for an extended period, etc. the taxpayer does not respond by that date and the case is forwarded to the Service's notices section for issuance of a statutory notice of deficiency. While the case is in the notices section, but before the statutory notice is actually issued, the taxpayer signs and returns the waiver of restrictions on assessment, Form 870 (or a similar form). Before the waiver can be associated with the administrative file, the notices section issues a statutory notice of deficiency for the same year and for the same amount of tax that is included on the waiver form.

If the waiver is received and an assessment is made before a notice of deficiency is actually issued, the notice of deficiency is arguably invalid, because there is no longer any "actual" deficiency within the meaning of I.R.C. § 6211. The amount assessed becomes an amount previously assessed within the meaning of I.R.C. § 6211(a)(1)(B). However, the Tax Court has held "it is not the existence of a deficiency but the Commissioner's determination of a deficiency that provides a predicate for Tax Court jurisdiction." [Emphasis supplied.] Hannan v. Commissioner, 52 T.C. 787, 791 (1969) nonacq. 1971-2 C.B. 4. Consequently, the taxpayer who is issued a notice of deficiency, whether valid or invalid, may petition the Tax Court to redetermine the deficiency proposed by the Commissioner even though, technically, the taxpayer may have waived this right to contest the amount of deficiency before assessment is made. We leave for another time a discussion of whether or not the Tax Court would take jurisdiction in such a case. Under the rationale of Hannan, the Tax Court would probably accept jurisdiction.

An I.R.C. § 6213(d) waiver, accompanied by a payment of the tax, should be assessed as soon as possible after receipt by the office considering the case. If a taxpayer includes payment with the waiver, the taxpayer either agrees the tax is owed or desires to forego the Tax Court as a forum. After such waiver, if the Service issues a notice of deficiency prior to assessment and the taxpayer timely petitions the Tax Court, the taxpayer will be negating his right to sue for a refund in a district court or the United States Claims Court. The reason is any decision entered by the Tax Court would be res judicata for the tax year and a subsequent suit for refund for that tax year would be barred.

Where the pages following the notice of deficiency specify wrong information, including the amount of the deficiency and the reasons for proposing a deficiency, the Tax Court has held the deficiency notice is valid. Scar v. Commissioner, 81 T.C. 855 (1983). The reason for mentioning Hannan and Scar here is to emphasize, contrary to apparent belief by the district, that a 90-day suspension period within which a taxpayer may petition the Tax Court does apply, in any event, if the Commissioner issues a notice of deficiency for the same amount included on the I.R.C. § 6213(d) waiver received by the Service prior to issuance of the notice, particularly if assessment and payment were not made prior to issuance. By issuing a notice of deficiency, the Service is telling the taxpayer it will forego assessment of the amount of that proposed deficiency for a period of at least 90 days and will assess within the 60 days thereafter pursuant to I.R.C. § 6503(a)(1). By issuing the notice, the Service is also permitting the taxpayer to file a Tax Court petition. Under the Tax Court's view, the underlying explanation of the deficiency which may be erroneous, will have no bearing per se on the validity of a notice of deficiency. Only the cover letter addressed to a taxpayer, relating to a specific tax year, and specifying the amount of a proposed deficiency is the "ticket to the Tax Court." Jones v. Commissioner, 62 T.C. 1, 2 (1974); Scar v. Commissioner, 81 T.C. 855, 860-861 (1983).

The holding in Rev. Rul. 66-17, 1966-1 C.B. 272, on the facts stated therein, applies only to I.R.C. § 6213(d) waivers received by the Service after the issuance of a notice of deficiency. Under I.R.C. § 6503(a)(1), the 90-day suspension period is terminated by receipt of the waiver. The reason is the Service had invoked I.R.C. § 6503(a)(1) and was prohibited from assessing the amount in the notice of deficiency. The taxpayer then terminated the 90-day prohibition period by filing a waiver and allowed the 60-day period to become operative.

Thus, a waiver received before a notice of deficiency is issued appears to be a waiver of (and consent to) the assessment of an amount waived for the year as indicated on the waiver. A

notice of deficiency subsequently issued may be for a different amount or based upon different issues or for the same amount. Accordingly, the Tax Court would probably hold that the suspension period applies because the Service issued the notice, placing the I.R.C. § 6213(a) statutory prohibition period into effect.

Of course, there is prevailing case law that permits "tack time" to be added to the applicable suspension period. Ramirez v. United States, 538 F.2d 888 (Ct. Cl. 1976) cert. denied 429 U.S. 1024 (1976); Meridian Wood Products Co., Inc. v. United States, 725 F.2d 1183 (9th Cir. 1984); United States v. Scharfman, 81-2 U.S.T.C. 9630 (S.D.N.Y. 1981). Nonetheless, we strongly recommend that you advise the District Director, Laguna-Niguel, to strive to complete assessments on I.R.C. § 6213(d) waivers not later than 60 days after they are received, even though a legally defensible position can be taken for later assessments.

In this technical advice, we have limited our conclusion to the situation where the Service should not have issued a notice of deficiency. Under present law, there is no authority to rescind a notice. However, legislation which has cleared the Conference Committee and which is pending at this time in Congress would permit the Commissioner, with the consent of the taxpayer, to rescind a notice of deficiency under certain prescribed circumstances.

DISCUSSION OF ISSUE NO. 2

I.R.C. § 6501(c)(7) was newly enacted by § 447(a) of the Deficit Reduction Act of 1984, P.L. 98-369, 98th Cong. 2d Sess., effective with respect to documents received by the Commissioner after July 18, 1984. The amendment was explained in the Conference Report, H. Rept. 98-861, 98th Cong. 2d Sess. p. 1123, filed June 23, 1984, as follows:

> House bill
>
> The bill makes a number of minor amendments relating to Treasury administrative provisions. The bill *** allows the Internal Revenue Service a minimum of 60 days to assess unpaid taxes shown on an amended return, ***
>
> Senate amendment
>
> The Senate amendment is the same as the House bill.
>
> Conference agreement
>
> The conference agreement follows the House bill and Senate amendment.
> [1984-3 C.B. Vol. 2, 377]

I.R.C. § 6501(c)(7) is titled as "Special rule for certain amended returns." The amended return referred to is an amended return which shows the taxpayer agrees to owing additional tax and which is filed with the Service within 60 days prior to expiration of the statute of limitations on assessment for the tax year covered by the original return. Although the title to the section refers to "amended returns," the statutory provision itself is explicitly applicable to any "written document signed by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable year". Thus, the statutory provision itself is not limited to amended returns, but applies to "documents" which meet the definitional standards described. A waiver under I.R.C. § 6213(d) is a written document signed by the taxpayer showing that the taxpayer owes an additional amount of tax for the taxable year.

The question then is whether the statutory provision, which was enacted as a remedy for the Service (to prevent a taxpayer from arguing that an assessment of an admitted liability was rendered illegal under the bar of limitations by performance of a ministerial act after expiration of the statute) should be restricted in application only to amended returns. We think the correct interpretation of the statute, and the one that gives due regard to the purpose mentioned in the parenthetical, is to extend the plain use of the term "document" to include an I.R.C. § 6213(d) waiver that fits the definition in the text of the statute.

The recent Tax Court opinion in Stanley Works and Subsidiaries v. Commissioner, 87 T.C. No. 22 (filed August 12, 1986) made clear that as a matter of statutory construction titles have no substantive meaning and cannot take the place of clear, detailed provisions in the text of the statute itself:

> [H]eadings and titles are not meant to take the place of the detailed provisions of the text. *** [M]atters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. [Citations omitted.] For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for resolution of a doubt. But they cannot undo or limit that which the text makes plain. [Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., 331 U.S.

519, 528-529 (1947).] Stanley Works and Subsidiaries v. Commissioner, 87 T.C. No. 22 (filed August 12, 1986) sl. op. p. 48.

Also see Application of Magnus, 299 F.2d 335, 337 (2d Cir. 1962) [62-1 U.S.T.C. 9280]. Id. Sl. Op. p. 49

DISCUSSION OF ISSUE NO. 3

With the onset of computer generated forms, the Commissioner has introduced a number of forms for various taxes or for different situations that have designated identifying numbers. For over 30 years, the Service has relied upon Form 870 to represent an I.R.C. § 6213(d) waiver of the restrictions on and consent to the assessment of a deficiency. That form is also used to show an overassessment amount as well as a deficiency amount in respect of a taxable year. Form 870 is a unilateral waiver that does not require acceptance by the Service to be effective. Consequently, the time within which to assess continues to run after the Service receives Form 870 in the same manner as it does without Form 870.

Form 870-AD, on the other hand, is not a unilateral waiver of the restrictions on assessment and, before it can be effective, the form must be signed and accepted by a representative of the Service with authority delegated to do so. The authority to settle cases by executing Form 870-AD has been delegated to certain Service officials in Delegation Order No. 66 (Rev. 10), 1980-1 C.B. 571. Also see Gardner v. Commissioner, 75 T.C. 475, 478 (1980). While Form 870-AD is not a formal closing agreement under I.R.C. § 7121, the taxpayer promises not to claim any refund of the amount of deficiency waived and the Service promises, in the absence of fraud, etc., not to determine any additional deficiency. Courts have not permitted taxpayers to maintain refund suits to the detriment of the Service (e.g. after the statute on assessment has run) after executing a Form 870-AD settlement. Elbo Coals, Inc. v. United States, 763 F.2d 818 (6th Cir. 1985); Stair v. United States, 516 F.2d 560 (2d Cir. 1975). Before being signed by the Service, Form 870-AD is merely a conditional offer to exercise the waiver provisions of I.R.C. § 6213(d). Until that offer is accepted by the Service, presumably after "horse trading" or bargaining with respect to issues or adjustments between the taxpayer and the Service, no effect can be given to the document.

For purposes of determining the assessment statute expiration date (ASED) the Form 870-AD is treated exactly the same as Form 870, but not until it has been accepted and signed

on behalf of the Commissioner. Form 870-AD has a legend at the bottom of the form for entry of a signature on behalf of the Commissioner. Form 870 does not have such a legend.

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